

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LORI JACOBS,

Plaintiff,

vs.

WAL-MART STORES, INC., a Delaware  
corporation,

Defendant.

NO. 3:17-CV-05988-RJB

DEFENDANT’S REPLY IN SUPPORT  
OF MOTION TO BIFURCATE

**Note on Motion Calendar:  
February 22, 2019**

**I. INTRODUCTION**

This case involves claims of disability discrimination and failure to make reasonable accommodations, under both the ADA and WLAD with the three primary issues being (1) essential job function, (2) reasonable accommodation, and (3) estoppel from claiming “disability.” Defendant’s Motion to Bifurcate is based on the fact that in the course of discovery and trial preparation conducted in recent weeks,<sup>1</sup> it has become increasingly apparent that to a great extent, Plaintiff will seek to establish liability for her substantive claims based not on the

<sup>1</sup> Plaintiff complains that Defendant did not raise the issue of bifurcation sooner, and has only done so now “on the eve of trial.” See Dkt. 224 at 2. However, the need for bifurcation became apparent only after Defendant’s Motion for Summary Judgment was denied on January 7, 2019 (which sought the complete dismissal of Plaintiff’s punitive damages claim) and through discovery conducted more recently. Thus, Walmart could not have anticipated at an earlier time that Plaintiff would attempt to try her case based largely on extraneous evidence and issues, which has become increasingly apparent through Plaintiff’s response to Defendant’s Motion in Limine relating to issues of redaction, Plaintiff’s deposition designations (where she includes counsel’s instruction to witnesses to not testify about attorney-client communications), and Plaintiff’s trial brief, where she attempts to argue Walmart’s reliance on an attorney for legal advice somehow proves punitive conduct.

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particular facts and circumstances of Plaintiff's case, but by seeking to interject numerous extraneous issues. As a result, a substantial portion of the evidence Plaintiff has indicated she plans to introduce at trial has no bearing on the particular facts of Plaintiff's discrimination claims and bifurcation is appropriate.

## II. REPLY

### A. Jury Instructions Will Not Protect Walmart from Unfair Prejudice.

Plaintiff's Opposition Brief does not address the broader concerns of unfair prejudice raised by Walmart's Motion to Bifurcate. Plaintiff baldly asserts that any prejudice to Walmart would be addressed by jury instructions. Plaintiff is incorrect. Here, bifurcation is necessary to prevent evidence regarding punitive damages to be considered by the jury before it reaches its decision on liability and compensatory damages sought under Plaintiff's substantive causes of action. There is no sufficient jury instruction to protect Walmart from being unfairly prejudiced through presentation of evidence of financial status and/or alleged malice or reckless indifference.

Much of the evidence Plaintiff seeks to introduce is wholly distinct from, and irrelevant to, the particular facts of Plaintiff's discrimination claims, the accommodations offered, or Walmart's liability for the specific conduct at issue in Plaintiff's substantive causes of action. As explained below, bifurcation is an effective and necessary tool to prevent that unfair result, and can be accomplished with relatively minimal delay or duplication of evidence.

### B. Bifurcation Will Promote Judicial Economy and Further the Convenience of the Parties and the Court.

The Court may "for convenience, to avoid prejudice, or to expedite and economize ... order a separate trial of one or more separate issues [or] claims ..." Fed. R. Civ. P. 42(b). This rule confers "broad discretion upon the district court to bifurcate a trial, thereby deferring costly and possible unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Zivokovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9<sup>th</sup> Cir. 2002). A district

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1 court's refusal to bifurcate a trial is accordingly reviewed for an abuse of discretion. *Hilao v.*  
 2 *Estate of Marcos*, 103 F.3d 767, 782 (9<sup>th</sup> Cir. 1996).

3 ***1. Bifurcation Will Protect Against Undue Prejudice and Delay.***

4 If Plaintiff is allowed to present evidence based on Walmart's financial earnings and  
 5 status, it will require Walmart to, in turn, present evidence to defend against these various  
 6 extraneous claims. For example, if Walmart needs to respond to each listing of total revenue,  
 7 operating cash flow, cash returned to shareholders through dividends and share repurchases, etc.  
 8 and claims of malice or reckless indifference, a series of ancillary "mini-trials" will ensue,  
 9 needlessly extending the trial before the jury even has the opportunity to consider more basic  
 10 questions of whether liability and/or compensatory damages exist on Plaintiff's substantive  
 11 causes of action. The core issues are whether any disability discrimination took place and  
 12 whether there was a failure to accommodate. If the answer is in the negative, the trial will result  
 13 in a defense verdict and this evidence need not be considered in the first instance.

14 To be clear, Walmart disputes the relevance and admissibility of much of the evidence  
 15 Plaintiff will rely on *for any purpose*, and has moved the Court *in limine* preventing the  
 16 introduction of such evidence. Additionally, Walmart maintains that punitive damages are not  
 17 proper in this case for the reasons more particularly set forth in Walmart's Motion for Summary  
 18 Judgment. Dkt. 102 at 9. But even if Plaintiff's punitive damages claim survives, the Court  
 19 should still bifurcate trial as a way to simplify this case and potentially avoid these difficult  
 20 issues altogether. The Ninth Circuit favors bifurcation for the sake of judicial economy, as a  
 21 means of preventing precisely such a situation. *See Danjaq, LLC v. Sony Corporation*, 263 F.3d  
 22 942 (9<sup>th</sup> Cir. 2001) (affirming the trial court's order bifurcating trial and noting, "[o]ne favored  
 23 purpose of bifurcation is to accomplish just what the district court sought to do here – avoiding a  
 24 difficult question by first dealing with an easier, dispositive issue."), citing *Hirst v. Gertzen*, 676  
 25 F.2d 1252, 1261 (9<sup>th</sup> Cir. 1982). Bifurcation is appropriate because it will allow the jury to

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1 consider threshold questions of liability and compensatory damages and eliminate the risk that  
 2 the jury, the Court, and the parties will have to expend considerable time and resources litigating  
 3 over financial status and alleged malice or reckless indifference, which may ultimately prove to  
 4 be unnecessary. In such circumstances, it is entirely appropriate for the Court to employ  
 5 bifurcation as an extra safeguard.

6 ***2. The Issues of Liability for Punitive Damages, and the Amount of Any Punitive***  
 7 ***Damages Award, Can Be Bifurcated with Minimal Duplication of Evidence.***

8 Plaintiff argues that “separate trials of liability/compensatory and punitive damages  
 9 issues would certainly lengthen the time required for trial in this action.” Although bifurcation  
 10 may necessarily result in some duplication of evidence, Plaintiff’s claims are overstated and any  
 11 delay due to duplication of evidence in a bifurcated punitive damages proceeding would be  
 12 minimal.

13 The issues and evidence pertaining to liability and compensatory damages on the  
 14 Plaintiff’s substantive claims are straightforward. To determine Walmart’s liability on Plaintiff’s  
 15 substantive causes of action, the jury must examine the facts and circumstances of Plaintiff’s  
 16 employment. These relatively straightforward considerations of liability can easily be tried  
 17 separately from the extraneous issues Plaintiff apparently plans to use to support a punitive  
 18 damages claim, as set forth above. Duplication of evidence, if any, would be minimal, and is  
 19 outweighed by the potential benefits that bifurcation offers.

20 **III. CONCLUSION**

21 For the foregoing reasons, Walmart respectfully requests the Court grant its motion to  
 22 bifurcate the issues of liability for, and amount of, any punitive damages from the trial on the  
 23 issues of liability and compensatory damages on Plaintiff’s substantive causes of action.

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1 DATED this 20<sup>th</sup> day of February, 2019.

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DEFENDANT'S REPLY IN SUPPORT OF  
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**CERTIFICATE OF SERVICE**

I, , hereby certify that on February 20, 2019, I electronically filed the following:

- **Defendant's Reply In Support Of Motion to Bifurcate; and**
- **Certificate of Service.**

with the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 20<sup>th</sup> day of February 2019.

/s/ Tatyana Stakhnyuk  
Tatyana Stakhnyuk, Legal Assistant

DEFENDANT'S REPLY IN SUPPORT OF  
MOTION TO BIFURCATE - NO. 3:17-CV- - 6 -  
05988-RJB